

# SANDLER, REIFF, YOUNG & LAMB, P.C.

December 14, 2012

Via E-Mail and First Class Mail

Jeff S. Jordan, Esq.  
Supervisory Attorney  
Federal Election Commission  
999 E Street, N.W.  
Washington D.C. 20463

Re: MUR 6684

Dear Mr. Jordan:

I serve as counsel for John Gregg and Gregg for Indiana, and I am writing in response to the Commission's letter dated November 8, 2012 regarding the above referenced matter and enclosing a complaint from James R. Holden.

John Gregg was the Democratic nominee for Governor for the 2012 general election, Gregg for Indiana was Mr. Gregg's principal campaign committee and was registered as a political committee with the state of Indiana. Mr. Gregg's committee accepted contributions and expenditures in connection with the gubernatorial election in accordance with the laws and regulations of the State of Indiana. Mr. Gregg's opponent was Congressman Mike Pence. Mr. Gregg was defeated by Congressman Pence by a margin of 49.6% to 46.4%.

Richard Mourdock was the Republican nominee for United States Senate in 2012. Mr. Mourdock was considered the front runner for several months in the Senate election. However, during a debate on October 23, 2012, Mr. Mourdock made a statement regarding rape that received significant national news media attention. This statement was as follows: "I struggled with it myself for a long time, but I came to realize life is that gift from God," Mourdock said. "And I think even when life begins in that horrible situation of rape, that it is something that God intended to happen." The controversial statement generated significant national outrage and caused several Republican leaders to distance themselves from Mr. Mourdock. By the time Mr. Gregg included the statements by Mr. Mourdock in his advertisements (which began to air on October 31, 2012), Mr. Mourdock's campaign was in a free-fall and as of that date, fell way behind his Democratic opponent, Joe Donnelly. See "Dem. Poll shows Mourdock Tanking, Donnelly up 9 in Indiana", Politico, October 31, 2012, found at <http://www.politico.com/blogs/burns-haberian/2012/10/dem-poll-shows-murdock-tanking-donnelly-up-in-indiana-147842.html> (accessed December 13, 2012). Mr. Mourdock ultimately lost the election by a margin of 50% to 44% (a third party candidate received 6% of the vote).

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The complaint alleges that an advertisement titled "Back and Forth" and run by Gregg for Governor "attacked or opposed" Richard Mourdock, the Republican nominee for United States Senate for the State of Indiana for the 2012 general election. The advertisement includes three video clips of Mr. Mourdock. The first clip is a statement by Mr. Mourdock regarding the Tea Party. The second clip is an interview with Mr. Mourdock where he discusses his political philosophy in that it is to "inflict my opinion on someone else." The third clip features the now infamous statement regarding pregnancy and rape. Other than the clips, there are no other mentions of Mr. Mourdock, nor does the advertisement advocate Mr. Mourdock's election or defeat or otherwise comment or elaborate on the public statements made by Mr. Mourdock. The closing statement of the advertisement is "You can stop the Tea Party with Governor John Gregg."

### DISCUSSION

#### **1) The Advertisement did not "attack" or "oppose" Richard Mourdock**

The complainant in this matter alleges that John Gregg and Gregg for Indiana violated 2 U.S.C. § 441i(f) because spending on the advertisement did not meet the "prohibitions, limitations and reporting requirements of [the] Act." 2 U.S.C. § 441i(f)(1).

The provisions of section 441i(f)(1) above are triggered if a candidate for State or local office disseminate a public communication that "promotes or supports or attacks or opposes" a federal candidate. See 2 U.S.C. § 431(20)(A)(iii).<sup>1</sup>

The advertisement disseminated by Gregg for Indiana did not "attack or oppose" any federal candidate, as alleged in the complaint. By including Mr. Mourdock in his advertisement, the Gregg campaign's sole goal was to clearly link his opponent to Mr. Mourdock's views regarding the Tea Party and abortion. In fact, Congressman Pence's response to Mr. Mourdock's statement regarding rape became a major issue in and of itself in the gubernatorial election a week prior to the airing of the advertisement as Congressman Pence appeared to shift his stance on his own views regarding abortion and rape after the overwhelming negative response to Mr. Mourdock's statements. See e.g. Tom Coyne, "Gregg hits Pence for wavering on comments from Mourdock", October 25, 2012, found at <http://posttrib.suntimes.com/news/15967064-418/gregg-hits-pence-for-wavering-on-mourdock-comment.html> (Accessed December 14, 2012).

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<sup>1</sup> Although not alleged by the complainant, it should be noted that the "Back and Forth" advertisement was not an electioneering communication. Commission regulations specifically exempt communications paid for by a state or local candidate from the electioneering provisions so long as the advertisement does not "promote or support or attack or oppose" a federal candidate. 11 C.F.R. § 100.29(d)(5).

Therefore, the Gregg advertisement was clearly designed to tie Congressman Pence to Mr. Mourdock's statements and views by merely playing clips of public statements by Mr. Mourdock and by interposing quotes by Mr. Pence that tie him to those statements and views. The intent of the advertisement is clear by its closing line which solely advocates the election of Mr. Gregg.

To be sure, this is precisely the type of advertisement that Congress contemplated as being permissible in the wake of the passage of this provision and was specifically cited by Justice Stevens in McConnell v. FEC for the proposition that 441i(f)'s scope was limited in this way:

See 148 Cong. Rec. S2143 (Mar. 20, 2002) (statement of Sen. Feingold) (Section 323(f) does not prohibit "spending non-Federal money to run advertisements that mention that [state or local candidates] have been endorsed by a Federal candidate or say that they identify with a position of a named Federal candidate, so long as those advertisements do not support, attack, promote or oppose the Federal candidate").

McConnell v. FEC, 540 U.S. 93, 185, n. 71 (2003)

Ultimately, the ad neither "attacked" or "opposed" Mr. Mourdock. Rather, as explained by Senator Feingold in his floor statement above, the ad was intended to create linkages with Congressman Pence and Mr. Mourdock's controversial statements. The fact that the final tag line ends exclusively with an exhortation to vote for Mr. Gregg is clear evidence that the communication was not intended to "attack" or "oppose" Mr. Mourdock nor did the advertisement reference Mr. Mourdock's candidacy. See MUR 5544 (Lack of reference to federal candidate's candidacy in advertisement was seen as an effort to boost candidacy of state candidate and not the federal candidate).

**2) The Commission has failed to provide any meaningful guidance as to the meaning of "attack" or "oppose"**

Even assuming *arguendo* that this advertisement presents a close call as to whether it "promotes or supports or attacks or opposes" a federal candidate, the Commission should not use the enforcement process to determine whether a valid campaign advertisement intended solely to influence a non-federal election was somehow subject to federal regulation.

First, after the passage of the Bipartisan Campaign Reform Act of 2002 ("BCRA") the Commission failed to provide a definition to the terms promote, support, attack or oppose. Since its promulgation, the Commission has taken actions that have denied the public with any guidance as to the meaning of these terms. First, during the rulemaking process to implement the BCRA, the Commission provided a proposed definition of these terms and requested comment on how to define these terms but did not include any definition in its final rules. See Notice of Proposed Rulemaking, 67 Fed. Reg. 35654, 35681 (May 20, 2002) (Proposed 11 C.F.R. § 300.2(l)). It should be noted that the advertisement in question in this matter would clearly not attack or oppose a federal candidate under the 2002 proposed definition. The proposed

definition was excluded from the final regulations without any apparent explanation. See Explanation and Justification, *Prohibited and Excessive Contributions; Non-Federal Funds or Soft Money; Final Rule*, 67 Fed. Reg. 49064 (July 29, 2002).

Second, during the consideration of Advisory Opinion 2003-25 (Weinzapfel) the Commission had its first opportunity to address the term "promote or support or attack or oppose" in an advisory opinion request where a federal candidate wished to appear in an advertisement that endorsed a candidate for local office. The Draft opinion contained a significant discussion of the meaning of "promote or support or attack or oppose." See Draft Advisory Opinion 2003-25 (Agenda Document 03-75 (October 9, 2003)). However, the final opinion essentially deleted most of the analysis contained in the Draft Opinion.<sup>2</sup>

It is clear that the Supreme Court's decision in McConnell v. Federal Election Commission caused significant confusion and instability in the area of content analysis of political speech. See e.g. James Bopp, Jr. and Richard E. Coleson, The First Amendment is Still not a Loophole: Examining McConnell's Exception to Buckley's General Rule Protecting Issue Advocacy, 31 N. KY. L. REV. 289 (2004).<sup>3</sup> Thus, in the First Amendment context, the Commission should not determine, on a first impression basis, that an advertisement that is clearly designed to advocate the election of a state candidate, is somehow subject to federal regulation merely because it intended to tie the state candidate's opponent to the views of the federal candidate. This is contrary to the First Amendment and contrary to the intent of Section 441i(f). In this matter, the Commission must adhere to Justice Roberts' admonition: "Where the First Amendment is implicated, the tie goes to the speaker, not the censor." Federal Election Commission v. Wisconsin Right to Life, Inc., 551 U.S. 449, 474 (2007).

Unfortunately, over ten years after the passage of the BCRA, the Commission is yet to articulate any standards for which to evaluate whether a communication by a state candidate could fall within the provisions of section 441i(f). Thus, until the Commission can articulate appropriate standards for delineating such a standard for those communications that may present a close call, it should not, on a case by case basis, make such determinations in an enforcement context.<sup>4</sup> Such an approach is an affront to the First Amendment and fundamental due process. See FEC v. Arlen Specter '96, 150 F.Supp.2d 797, 813 (E.D.Pa.2001) ("the due process clause

<sup>2</sup> The tortured history of the failure to define these terms is discussed at length in dueling concurring opinions in this Advisory Opinion. See Concurring Opinion of Commissioner Scott E. Thomas and Commissioner Danny Lee McDonald, Advisory Opinion 2003-25 (November 12, 2003) & Concurring Opinion of Vice Chairman Bradley A. Smith and Commissioners David M. Mason and Michael E. Toner, Advisory Opinion 2003-25 (December 8, 2003).

<sup>3</sup> Indeed, it is highly unlikely that the current Court would have upheld the term "promote or support or attack or oppose," especially through the use of the dismissive footnote used by Justice Stevens in McConnell, 540 U.S. at 170, n.64. See Citizens United v. FEC, 130 S.Ct. 876, 895-896 (2010).

<sup>4</sup> See e.g. Concurrence in Advisory Opinion 2006-10 of Commissioners David M. Mason and Hans A. Von Spakovsky and Dissent of Chairman Michael E. Toner (September 26, 2006).

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prevents deference from validating the application of a regulation that fails to give fair warning of the conduct it prohibits or requires").

### CONCLUSION

John Gregg lost his election for Governor and there are no resources remaining in his campaign committee. In an effort to get elected to Governor, Mr. Gregg sought to latch on to anti Tea Party sentiment and link his opponent to controversial and notorious statements made by Mr. Mourdock. The statements were shown without any comment as to the fitness of Mr. Mourdock to hold federal office and were used for the sole purpose of advocating the election of Mr. Gregg. Under the most generous reading of section 441i(f) this advertisement should not be regulated by federal law. Even if this advertisement presents a close call on this issue, the failure of the Commission to provide any meaningful guidance as to the application of this statute precludes its use in this instance as a matter of fundamental first amendment principals and due process. Therefore, the Commission should close the file in this matter and take no further action.

Respectfully submitted,



Neil P. Reiff

Counsel for John Gregg and Gregg for  
Indiana

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